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No. 90 - 5721

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1990

PERVIS TYRONE PAYNE,  
Petitioner,  
v.  
STATE OF TENNESSEE,  
Respondent.

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ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF TENNESSEE

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BRIEF, AMICI CURIAE  
IN SUPPORT OF RESPONDENT:

THE NATIONAL ORGANIZATION FOR  
VICTIM ASSISTANCE, THE NATIONAL  
VICTIM CENTER, THE CRIME  
VICTIMS LEGAL CLINIC, AND  
CALIFORNIA ATTORNEYS FOR  
CRIME VICTIMS.

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## QUESTIONS PRESENTED FOR REVIEW

- I. HAVE CRIME VICTIMS RELINQUISHED TO THE STATE THEIR RIGHTS AS INDIVIDUAL CITIZENS TO EXACT RETRIBUTION FOR HARM COMMITTED AGAINST THEM, CREATING A FUNDAMENTAL DUTY ON THE PART OF THE STATE TO PROTECT AND VINDICATE THESE RIGHTS?
- II. DOES THE 8TH AMENDMENT ALLOW FOR THE USE OF VICTIM IMPACT STATEMENTS IN THE PENALTY/SENTENCING PHASE OF A CAPITAL CASE?
- III. SHOULD A CRIME VICTIM BE RECOGNIZED AS A PARTY AND HAVE STANDING INDEPENDENT FROM THE PUBLIC PROSECUTOR FOR THE LIMITED PURPOSE AT THE SENTENCING PHASE (INCLUDING THE PENALTY PHASE OF A CAPITAL CASE) TO PRESENT A VICTIM IMPACT STATEMENT?

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VICTIM CENTER, THE CRIME VICTIMS  
LEGAL CLINIC, AND CALIFORNIA  
ATTORNEYS FOR CRIME VICTIMS

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1. Identity and interest of Amici Curiae:  
THE NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE, founded in 1975, is a national nonprofit membership organization dedicated to improving the rights and services for victims of crime through national advocacy, victim counseling, technical assistance, training and membership support. NOVA is located in Washington, D.C.

THE NATIONAL VICTIM CENTER, founded in honor of Sunny von Bulow, is a national, nonprofit organization based in Fort Worth, Texas. The Center's purposes are to promote responsiveness of the criminal justice system to the rights and needs of the victims of violent crime, as well as to increase the American public's awareness concerning the plight of crime victims through educational programs, conferences, and publications.

THE CRIME VICTIMS LEGAL CLINIC is a project of the California Center on Victimology, a nationally recognized comprehensive crime victim service agency founded in 1985 and based in San Diego, California. Among the goals of the Clinic and the Center are to protect the rights of crime victims in the criminal justice system, to provide training to the legal and mental health communities who counsel and treat victims of crime, and to reduce the trauma suffered by crime victims, their families, and the community in which they live.

CALIFORNIA ATTORNEYS FOR CRIME VICTIMS is a statewide network of trial litigators, founded in 1989, to protect the rights of crime victims in the civil and criminal justice systems, to give them a stronger, more coordinated voice in legal proceedings

affecting their lives, to share information, strategies and litigation developments and to train civil litigators to represent crime victims.

2. Desirability of a Brief Amici Curiae: the instant case is one in which the interests of victims of crime are directly involved. Amici represent two national victim advocacy organizations, the only law firm (legal clinic) in the country whose only clients are crime victims and is concerned with constitutional issues in criminal law, and the first statewide attorneys organization dedicated to protecting the rights of crime victims in the civil and criminal justice systems.

3. Reasons For Believing that Existing Briefs May Not Present all Issues, and Avoidance of

Duplication: In this brief, Amici will discuss national policy - related and legal issues relating to the impact of this Court's decision in the instant case and peculiar to the crime victim as the primary client. Counsel for Amici have consulted with Counsel for Respondent in an effort to avoid unnecessary duplication and believe that their policy and legal arguments will present issues that are not otherwise raised.

4. Consent of the Parties: Counsel for the Respondent and Counsel for the Petitioner have consented to this filing. Letters to this effect are lodged with the Clerk of the Court.

#### SUMMARY OF ARGUMENT

I. SINCE CRIME VICTIMS HAVE RELINQUISHED

TO THE STATE THEIR RIGHT TO EXACT  
INDIVIDUALIZED RETRIBUTION FOR INJURY  
CAUSED AT THE HANDS OF A WRONGDOER,  
THE STATE HAS A FUNDAMENTAL DUTY TO  
VINDICATE VICTIMS' INTERESTS.

II. THE PURPOSE OF A SENTENCING HEARING IS  
TO BALANCE THE RIGHTS OF THE CONVICTED  
AGAINST THE HARM SUFFERED BY THE  
VICTIM IN ORDER TO ACHIEVE THE  
SOCIETAL GOAL OF DETERRENCE AND  
FAIRNESS, WITHOUT TRANSCENDING THE  
CONSTRAINTS OF THE 8TH AMENDMENT.

III. THE RIGHT OF THE CRIME VICTIM TO JURY  
CONSIDERATION OF VICTIM IMPACT  
STATEMENTS, OR COMMENT TO THE JURY BY  
THE PROSECUTOR CONCERNING VICTIM HARM,  
IN THE PENALTY/SENTENCING PHASE OF A  
CAPITAL CASE, WILL BE RESOLVED BY

RECOGNITION OF VICTIMS' LEGITIMATE  
CLAIM TO PARTY STATUS (STANDING)  
INDEPENDENT FROM THAT OF THE PUBLIC  
PROSECUTOR FOR THIS PURPOSE.

#### INTRODUCTION

As originally conceived, our criminal law  
was designed to accomplish a very limited  
but necessary function. That purpose  
was, quite simply, to protect citizens  
who chose to exercise their freedom and  
liberty within the constraints imposed by  
law, from citizens who chose not to. The  
need to secure the safety, liberty and  
property of law-abiding citizens has  
always been one of the primary  
justifications for the very existence of  
government. This principle was averred  
in the Declaration of Independence as the



creators' endowment of the inalienable right to life, liberty and the pursuit of happiness." It was carried into the preamble of the United States Constitution by a statement of purpose to "establish justice, insure domestic tranquility, and promote the general welfare." It has long been recognized by the United States Supreme Court that government "owes a duty to the people...to maintain peace and order and to assure the just enforcement of the law." The right of personal security from criminal aggression is an inherent and inalienable right. It seems clear that victims, both actual and potential, are central to the criminal justice system. It may be that protection of the lives,

liberty and property of the citizenry in a free society is but one of the basic purposes of government. However, beyond question, it is the primary purpose which justifies the existence of a criminal justice system. Nicholson, G., *Forgotten Victims: An Advocate's Anthology*, P. vi (1977).

There has surfaced within the last decade, a question about the role prosecutors and courts have assigned to crime victims, whom the former purport to represent for some purposes - but not others - and whom the latter have treated as appendages of the prosecutor.

Recent case law supports a position that the crime victim has a role independent from that of the prosecutor, which may be tempered by

judicial authority, resulting in at least limited standing, including the right to make victim impact statements at sentencing hearings in capital cases.

If, however, crime victims are found to have relinquished their rights to exact their own direct and immediate justice for the greater good of the state, then there is a compelling and fundamental duty of the state to support the victim and to represent these interests with no less vigor than is required of a defense attorney in the effective representation of his client.

This Court has previously expressed concern for victims of violent crime. Justice Byron White, in his dissent in Miranda v. Arizona, 384 U.S. 436 at 542 (1966) stated:

In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection and who without it can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined. There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case. (Emphasis added.)

The Court's role in ensuring that the prosecutor upholds his end of this societal contractual relationship, is to conduct a sentencing proceeding - guilt of the accused having been established - which results in a ruling only after thorough and substantive consideration of victim impact (harm).

#### ARGUMENT

I. SINCE CRIME VICTIMS HAVE RELINQUISHED TO THE STATE THEIR RIGHT TO EXACT INDIVIDUALIZED RETRIBUTION FOR INJURY CAUSED AT THE HANDS OF A WRONGDOER, THE STATE HAS A FUNDAMENTAL DUTY TO VINDICATE VICTIMS' INTEREST.

Woven into the fabric of a free society is the concept of rights and responsibilities. It should be axiomatic that everyone has a

constitutional "right" not to be a victim of crime. A violation of law is an offense against society as well as an invasion of the personal rights of the victim. Perhaps that is the reason a majority of this Court has held that "in the administration of criminal justice, courts may not ignore the concerns of victims." Morris v. Slappy, 461 U.S. 1, 14 (1983). Over one hundred years ago, Chief Justice Waite, speaking for a unanimous Court, observed that: "Allegiance and protection are...reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance." Minor v. Happersett, 88 U.S. 162 (1875).

In early times and even more recently (the American frontier) victims and their families could practice "clan" or "familial" justice,

resulting in full victim participation and immediate gratification. However, progress soon dictated a less random and more systematic approach to justice. So organized or "planned" justice (i.e. the duel) became popular. Again, victim participation and gratification were quick and sure. See Gittler, 11 Pepperdine L.Rev. 117, 123 (1984); Aynes, 11 Pepperdine L.Rev. 63, 72 (1984).

Perhaps it was felt that the addition of a public prosecutor - which came shortly after the American Revolution - would be the great equalizer, thereby solving at least a couple of the principal complaints of both the old English system of private justice and of the old West's system of surefire justice: where only money or a gun carried clout. See Gittler, Supra at 125.

Thomas Jefferson wrote:

Whereas, it frequently happens that wicked and dissolute men, resign themselves to the dominion of inordinate passions, commit violations on the lives, liberties and property of others, and, the secure employment of these having induced men to enter into society, government would be defective in its purpose were it not to restrain such criminal acts by inflicting due punishments on those who perpetuate them...

See Carrington, Esq. Crime and Justice: A Conservative Strategy, Critical Issues, The Heritage Foundation (1982).

The quid pro quo created when this bargain was struck did not mean that crime victims



relinquished their right to demand personalized justice, but rather they agreed to do it by the rules, in return for the government's pledge to make the rules apply uniformly, thereby ensuring their right to the safe enjoyment of their families, lives, liberty, and property. See Aynes, 11 Pepperdine L.Rev. 63, 75 (1984).

This was a fair exchange: that collectively they could protect one another against the depredation of the "wicked and dissolute" more effectively than could one individual's money or another's gun.

Progressively, however, victims have been edged off stage, or, more accurately, they have been shoved aside. What once was a mutually beneficial relationship, is now only good for one of the team members. See

Gittler, Supra at 131, 133. Now there is "dis-ease" in the land; and rightly so: No longer do citizens trust that the agreement is being upheld by their government. They want, and must have, some evidence of good faith and fair dealing in this so-called societal contract. See Aynes, Supra, at 75. The right to participate at the sentencing phase (the penalty phase of a capital offense) seems fair.

At least forty-seven (47) states and the United States Congress have yielded to the public demand for a more meaningful role by approving laws ensuring that crime victims can make a Victim Impact Statement at the criminal's sentencing. Roland, D., Progress in the Victims Movement: No Longer the "Forgotten Victim", 11 Pepperdine L.Rev. 35, 51 (1989).

The criminal justice system cannot isolate itself from the people it was created to protect. According to Senator Joseph Biden, Chairman of the United States Senate Judiciary Committee, in a report to Congress, on March 12, 1991, the United States of America is the most violent nation on earth. This situation is creating an ever growing class of citizens whose collective voice should not, and will not, be ignored. The sentencing authority must not be blocked from hearing all relevant evidence including victim harm, thusly recognizing and validating a continuing faith in this societal contract between a government and its people.

The purpose to be served is compelling, and the duty to implement is no longer optional. Reference to the victim by the prosecutor

will not suffice. The victim's own impact statement during sentencing is the reasonable means of implementation. A determination of reasonableness requires balancing the effect of the private rights with the public good to be achieved. 16A C.J.S. Sec. 442, Constitutional Law (1984).

#### ARGUMENT

II. THE PURPOSE OF A SENTENCING HEARING IS TO BALANCE THE RIGHTS OF THE CONVICTED AGAINST THE HARM SUFFERED BY THE VICTIM IN ORDER TO ACHIEVE THE SOCIETAL GOAL OF DETERRENCE AND FAIRNESS WITHOUT TRANSCENDING THE CONSTRAINTS OF THE 8TH AMENDMENT.

While it is necessary to keep close watch over the rights of those accused of crime, the over-broad holding of Booth and its

progeny subjects victims to constrictions unsupported by Constitutional principles. Today juries are already given meticulous written guidelines when called upon to address the sentencing alternatives of life or death. Gregg v. Georgia 428 U.S. 153 (1976).

Prior to 1972, capital punishment laws expressly gave juries complete and unsupervised discretion to impose the death penalty. The jury was not required to follow any legal guidelines in making its decision, and it was not provided with any special information about the defendant's background or character beyond that offered to support the defendant's innocence. This unbridled discretion was upheld by the United States Supreme Court as late as 1971. McGautha v. California 402 U.S. 183 (1971). The Court,

however, significantly changed its position in the landmark case of Furman v. Georgia 408 U.S. 238 (1972). Furman, in effect, invalidated all death penalty statutes then in force, and directed that death penalty statutes be imposed under legislatively defined standards. The Furman Court held that the death penalty may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary or capricious manner. Id.

In 1976, the Court qualified and refined the Furman decision in Gregg v. Georgia when it established that all sentencing discretion should not be eliminated, but that it must be directed and limited. Gregg, 428 U.S. 153. As first laid down in Furman, juries are now given carefully crafted instructions within

preset and highly scrutinized parameters. Booth, however, goes even beyond those guidelines by narrowing justice to that proverbial filament through which justice for the victim can no longer survive. Snyder v. Massachusetts, 291 U.S. 97, 122 (1934).

Earlier, the Court in Weems v. United States, 217 U.S. 349 (1910), held that the Eighth Amendment was not static and concluded that:

[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. Id.

And so, using this standard as representative of a maturing society, we review the identical crimes of two men stealing loaves of bread from a shopkeeper. One man steals

the loaf to sell for gambling money; the other steals the loaf to feed his family. This "progressive" doctrine, as first enunciated in Weems, proposes that punishment should be determined by weighing the factors of each case, regardless of whether or not different penalties may result.

However, Weems, and the case law since that time, has steadily factored into punishment only the mitigating circumstances proposed by the defendant. This lopsided, "progressive" theory has completely failed America's crime victims. The "decency" that marks the progress of a maturing society should not be limited to defendant concerns. True progressive social enlightenment must mean something more than mere leniency for society's lawbreakers.



The jury needs to hear, to give life to, the abstract of "society". What better way for the jury to assess the harm done than through the voice of the shopkeeper, who suffered the true loss for each loaf of bread.

The Booth court would have the jury balancing a fictionalized reification of society against the defendant who not only is allowed, but is strongly encouraged to parade into the courtroom, a crying lover, a young child, parents and multitudes of friends. This is not simply tipping the scales but rather, breaking them; which leads to leniency not by extenuating circumstances, but by sheer volume.

The so-called progressive notion of society's "maturation" has left a trail of injustices for victims, whose participation and

cooperation have accounted for the successful outcome of many cases. Often, victims are the sole witnesses to the crime and are therefore indispensable to successful prosecutions and convictions. An estimated one-half of all crimes are not reported. The failure of crime victims to report crimes or actively cooperate with police and prosecutors is an alarming trend. Hudson, Crime Victims and the Criminal Justice System, 11 Pepperdine L.Rev. 23, 27 (1984).

Congress acknowledged the importance victims play as witnesses in the criminal court process when it declared in the Omnibus Victim and Witness Protection Act of 1982 that, "Without the cooperation of victims and witnesses the criminal justice system would cease to function; yet with few exceptions these individuals are either

ignored by the criminal justice system or simply used as tools to identify and punish offenders." Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1242 (1982).

Determining a sentence by resultant harm can promote two important societal goals: victims can give voice to the harm a crime has visited upon their personal lives, which, in turn can bring a measure of solace for the pain suffered. Furthermore, the victim, representing a microcosm of society, gives judge and jury a more fair picture of the potential injury to society, and may thus share society's consensus in what sentence should be imposed. See Murphey, 51 Univ. Chi. L.Rev. 1303 (1988).

As Justice Scalia wrote in the dissent in

Booth,

It seems to me, however -- and, I think, to most of mankind -- that the amount of harm one causes does beat upon the extent of his "personal responsibility." We may take away the license of a driver who goes 60 miles an hour on a residential street; but we will put him in jail for manslaughter if, though his moral guilt is no greater, he is unlucky enough to kill someone during his escapade.

It would follow from the holding in Booth, that contrary to Justice Scalia's well-reasoned analysis, punishment tailored to the moral culpability of the criminal, and not to the harm exacted by the crime, would assign equal punishment to the man who

murders and to the man who attempts murder but fails, since both had the intent to murder.

The proponents of the Booth holding argue that by allowing victims a voice, our new justice will be based on a battle of numbers, as well as victim social status: that the identical crime committed against a "popular" victim and against a "homeless orphan" will lead to society judging not the crime committed but rather the person against whom it is committed. The solution, however, is not to stifle the voices of victims whose need is great to give sorrow words.

Victims speaking of harm done, of the effect the crime has had on their lives, do not claim that one life is more valued than another, but rather bring into sharp focus

for the judge, the jury, and society, the realities of what the aftermath of violent crime exacts on each of these essential parts of life in a free society.

To muzzle all victims at capital sentencing hearings for fear that some may be more persuasive or express more eloquently the horrors of crime, is the truly arbitrary and capricious decision.

#### ARGUMENT

III. THE RIGHT OF CRIME VICTIMS TO JURY CONSIDERATION OF VICTIM IMPACT STATEMENTS OR COMMENT BY THE PROSECUTOR CONCERNING VICTIM HARM IN THE PENALTY/SENTENCING PHASE OF A CAPITAL CASE, WILL BE RESOLVED BY RECOGNITION OF VICTIMS' LEGITIMATE

CLAIM TO PARTY STATUS (STANDING)  
INDEPENDENT FROM THAT OF THE PUBLIC  
PROSECUTOR FOR THIS PURPOSE.

In his dissent in Booth, Justice Scalia wrote,

Many citizens have found one-sided, and hence, unjust the criminal trial in which a parade of experiences that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced -- which (and not moral guilt-alone) is one of the reasons society deems his act worthy of the prescribed penalty. . . . There is nothing in the Constitution that dictates the answer, no more in the field of capital punishment than

elsewhere. To require, as we have, that all mitigating factors which render capital punishment a harsh penalty in the particular case be placed before the sentencing authority, while simultaneously requiring, as we do today, that evidence of much of the human suffering the defendant has inflicted be suppressed is in effect to prescribe a debate on the appropriateness of the capital penalty with one side muted. If that penalty is constitutional, as we have repeatedly said it is, it seems to me not remotely unconstitutional to permit both the pros and the cons in the particular case to be heard. Booth at 520 (Scalia, J. dissenting). Emphasis added.



Elsewhere in the record of the case before this Court, amici for both the Congress of the United States and for the United States Department of Justice have presented arguments calling upon the Court to heed their strong and persuasive intent in passing laws at the Federal level which say, in sum: "We meant to put crime victims into the courtroom to be heard at all sentencing hearings in criminal cases."

It would appear that Justice Scalia finds no Constitutional impediment to accepting the position taken by the United States Congress and the Department of Justice: that to remedy the imbalance suffered by the victims, and in order to "lay before the sentencing authority the full reality of human suffering the defendant has produced", victim impact should be measured alongside any mitigation

of defendant blame.

The question then must be asked: if victim impact evidence in capital criminal sentencing hearings (penalty phase) is lawful, then does the victim have at least limited standing to be heard for purposes of determining the victim impact evidence, separate and apart from the prosecutor. While prosecutor and victim issues may seldom be at odds for the purpose herein discussed, without a determination about victim standing, the victim remains a nonentity, subject to being used, accorded access only when it suits the prosecutor.

The Canon of Ethics forbids attorneys to represent more than one client whose interests may produce a conflict in representation. Model Code Of Professional

Responsibility EC 5-15 (1980). The Canon goes on to say that doubts should be resolved against the propriety of the representation.

It is settled law that the public prosecutor represents the state specifically, and the victim only very generally. See Aynes, Supra at 73 (1984).

Over at least the last fifty years, prosecutors have appeared at hearings brought by defendants, requesting orders from a court for such things as psychological evaluations (Ballard v. Superior Court, 64 Cal. 2d 159, 1966) and physical examinations (People v. Bynon, 146 Cal App. 2d 7, 1956); as well as exclusion from courtrooms and appearances at lineups. See Aynes, Supra at 73 (1984).

There is now a growing trend to grant victims

the right to appear, and to be heard, in person or by counsel, at various criminal proceedings, (e.g. California Penal Code, Sec. 1191.1). Roland, D., Progress in the Victim Reform Movement: No Longer the "Forgotten Victim", 17 Pepperdine L. Rev., 35, 38 - 42, 50 - 56 (1989). There is also a recognition that the law does not authorize prosecutors to represent victims at such hearings. People v. Bullen, 204 Cal App 3d. 22, 25 (1988), Oziel v. Superior Court, 223 Cal App 3d. 1284 (1990).

Amici suggest that recognition by the Court of crime victims' independent and legitimate status as parties for the limited purpose herein proposed, will obviate the need to weigh the propriety of the use of victim impact evidence in the context herein argued.

## CONCLUSION

The police power imposes on the state the duty to protect the lives of its residents. [16A Am Jur.2d Constitutional Law Sec. 363 (1979).] The police power is founded on the duty of the state to protect its people and to provide for their safety. It is the foundation upon which our social system rests 16A C.J.S. Constitutional Law Sec. 433 (1984).

The punishment to be meted out must be determined by balancing the harm actually experienced by a crime victim, against the permissible and carefully scrutinized defendant circumstances. The victim's voice gives life to the impact of the crime and justly reflects not only vindication for the individual victim, but for the society it

represents as well.

Crime victims should be recognized as parties with standing in all criminal sentencing hearings, including those in capital cases. Any potential for arbitrariness can effectively be screened by the court, following guidelines set out in Gregg v. Georgia, and read together with those promulgated by each state.

Respectfully submitted,

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